THE GREATER SOUTHEAST COMMUNITY HOSPITAL FOUNDATION, INC., et al. (members of The Greater Southeast Healthcare System): Decision and Order Denying Creditors' Committee's Motion to Clarify, Alter or Amend the Order Sustaining in Part and Overruling in Part Debtors' Objection to Claims for Certain Pension Plan Contributions (**NOT FOR PUBLICATION IN WEST BANKRUPTCY REPORTER**).

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re	)	
	)	
THE GREATER SOUTHEAST	)	Case No. 99-1159
COMMUNITY HOSPITAL	)	(Chapter 11)
FOUNDATION, INC., et al.	)	(Jointly Administered)
(members of The Greater	)	
Southeast Healthcare	)	
System),	)	
	)	
Debtors.	)	

DECISION AND ORDER DENYING CREDITORS' COMMITTEE'S MOTION TO CLARIFY, ALTER OR AMEND THE ORDER SUSTAINING IN PART AND OVERRULING IN PART DEBTORS' OBJECTION TO CLAIMS FOR CERTAIN PENSION PLAN CONTRIBUTIONS

The Creditors' Committee[1] has filed a motion (Docket Entry ("DE") No. 2250) seeking clarification or reconsideration of the interlocutory order[2] implementing this court's decision regarding the debtors' objection to certain claims for pension plan contributions for the years 1998 and 1999.[3] The motion will be

[1] That is the entity's shorthand name which the court will use in this decision. The committee's proper full title is the Official Committee of Unsecured Creditors of The Greater Southeast Community Hospital Foundation, Inc. Despite that title, it has been authorized to represent the interests of unsecured creditors in the estates of all of the debtors in these jointly administered cases.

[2] The order (DE No. 2235) was entitled Order Sustaining in Part and Overruling in Part Debtors' Objection to Claim. The order was an interlocutory order because certain calculations were required before the allowed amounts of the claims could be decreed.

[3] The decision (DE No. 2234) was entitled Decision re Debtors' Objection to Claims of the Plan Administration Committee for the Greater Southeast Healthcare Defined Contribution Plan and the District of Columbia Nurses Association.

denied.

The court will assume that the reader is familiar with the court's prior decision and order, and with the terminology they employed. The motion seeks clarification or reconsideration regarding the court's determination that the claim based on the debtors' undisputed liability for the 1998 Pension Plan contribution is a prepetition claim entitled in part to treatment as a § 507(a)(4) priority claim and in part to treatment as a general unsecured claim not entitled to priority over other unsecured claims, with the parties to submit calculations of the amounts of the two different components of this prepetition claim. Decision at pp. 2 and 39-55.

I

The motion seeks, first, clarification

> whether the Court limited its decision to a determination of the priority of the 1998 contribution claim . . . or whether the Court sought to go a step further and deem the 1998 contribution as an "allowed" claim for the purposes of plan distribution under Bankruptcy Rule 3002(a) and section 502 of the Bankruptcy Code.

Under 11 U.S.C. § 507(a)(4), claims are entitled to a fourth level of priority only if they are "**allowed** unsecured claims for contributions to an employee benefit plan" [emphasis added] that meet certain other requirements. So in determining the extent to which the claim for the 1998 Pension Plan contribution met those other requirements, the court necessarily had allowed the claim

as an unsecured claim: it could not accord the claim any priority unless it was an allowed claim. Moreover, unless the court had been treating the claim as an allowed claim, there was no reason to determine the legal standards for fixing the extent of the claim's priority--and to direct the parties to submit calculations, based on those standards, of the portion of the claim entitled to § 507(a)(4) priority versus the amount not entitled to such priority. No clarification is necessary of what was plainly intended by the decision and order: the claim is allowed with part of the claim entitled to priority under § 507(a)(4), and part not entitled to priority.

II

The motion seeks, second, reconsideration of the allowance of the claim on the basis that no timely proof of claim was filed for prepetition pension plan contribution claims. Such reconsideration is unwarranted, as the claims asserted were litigated on the basis that they would be treated as an allowed prepetition claim to the extent that the claims were not entitled to treatment as a postpetition administrative claim. In its reply to the Joint Opposition filed by the Plan Committee and DCNA, the Creditors' Committee does not dispute the position of the Plan Committee and DCNA that:

> Until now, neither the Debtors nor the Creditors' Committee has, at any time, objected to allowance of the Plan Committee's claims on the grounds that they were not filed timely. Not only did no one object to

> the claims on this basis, but throughout this litigation the Debtors and the Creditors' Committee have consistently taken the contrary position that the Plan Committee's claims should be allowed as priority or as general unsecured claims.

Joint Opposition (DE No. 2291) at 3. The court will not allow belated assertion of an affirmative defense to such allowance. That defense could have been but was not raised prior to the court's hearing and deciding the issues, and is indeed contrary to affirmative positions taken in the litigation by the debtors with the Creditors' Committee's acquiescence.

A.

The Creditors' Committee does not dispute the representation that:

> The Creditors' Committee has been involved in every aspect of this proceeding. Counsel for the Creditors' Committee appeared at the depositions, pretrial hearings and trial of this [contested matter], and at all times supported the Debtors' positions. Never once did the Creditors' Committee take any position inconsistent with the positions taken by the Debtors or assert different objections to the Pension Plan's claims.

Joint Opposition at p. 4. The debtors, as debtors-in-possession exercising the powers of a trustee, were principally charged with the duty to object to claims, see F. R. Bankr. P. 3007 Advisory Committee Note (1983) ("While the debtor's other creditors may make objections to the allowance of a claim, the demands of orderly and expeditious administration have led to a recognition that the right to object is generally exercised by the

trustee."), but the Creditors' Committee joined in the litigation of the objection by appearing as a party at the pretrial proceedings and at part of the trial. The debtors handled the litigation in obvious consultation with the Creditors' Committee. Counsel for the Creditor's Committee requested that she be excused on the first day of trial, after the testimony of a few witnesses, "in the interest of conserving estate assets." Plainly, the Creditor's Committee elected to rely on the debtors' counsel's handling of the trial of the objection to the claims.

The Creditors' Committee is indeed correct that, although the Plan Committee and DCNA timely filed an administrative proof of claim on May 3, 2001, it never timely filed a proof of claim for prepetition pension contribution claims.[4] Nevertheless, the proof of claim included claims that were not administrative in character, but instead prepetition in nature, and hence the proof of claim, albeit untimely in asserting prepetition claims, served as an assertion of such claims. The debtors' objections did not

[4] However, the Pension Plan's proof of claim in each case included all claims that could be asserted by employees. Some of those employees filed timely proofs of claims for Pension Plan contributions for 1998. The litigation treated those claims as subsumed within the Pension Plan's proof of claim. To the extent an employee filed a timely proof of claim, that claim would have to be treated as timely asserted when subsumed in the Pension Plan's proof of claim. The Creditors' Committee has not alleged that the amounts of claims timely asserted by the employees is less than the amounts asserted by the Pension Plan's proof of claim.

object to the claims, to the extent that they included prepetition claims, on the basis of untimeliness, but instead treated the claims as allowed unsecured prepetition claims entitled only partially to priority under § 507(a)(4).[5] The objection to the claims commenced a contested matter under F.R. Bankr. P. 3007 and 9014 and set the parameters for litigation of that contested matter. In the pretrial and trial stages of that litigation, the debtors did not vary from the critical parameter set by the objection that a valid prepetition claim contained in the proof of claim would be an allowed claim, but not necessarily entitled in its entirety, under § 507(a)(4), to a fourth level of

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[5] For example, in the Debtors' Omnibus Objection to Proofs of Claim filed by Greater Southeast Healthcare System Defined Contribution Pension Plan and Others dated October 4, 2000 (the "Omnibus Objection"), the debtors asserted:

> To the extent the Debtors are found liable for unpaid contributions to the Pension Plan, and such contributions are not entitled to Administrative Expense or Fourth-Level Priority against a particular Debtor, such claim for unpaid contributions may be allowed only as a general unsecured claim.
>
> . . .
>
> To the extent the Debtors are liable for unpaid contributions to the Pension Plan for the 1999 Plan Year, and such liability does not qualify as an Administrative Expense or Fourth-Level Priority, such liability may properly be treated as a general unsecured claim.

Omnibus Objection at pp. 16, 31.

priority over other unsecured claims.[6] The debtors did not vary in this regard even after the conclusion of the presentation of evidence when they submitted post-trial briefs. As the court stated in its decision:

> The debtors concede[d] that the 1998 contribution

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[6] For example, in the Supplemental Memorandum in Support of Debtors' Objections to Proofs of Administrative Claim filed by Greater Southeast Healthcare System Defined Contribution Pension Plan and Others dated January 31, 2001 (the "Supplemental Memorandum"), filed shortly before the commencement of the trial, the debtors asserted that the claim for the 1998 Pension Plan contribution should be treated as a prepetition claim entitled, in part, to § 507(a)(4) priority, not that the claim should be disallowed as untimely:

> > Because The 1998 Contribution Accrued on December 31, 1998, It Only Is Entitled To Priority Under 11 U.S.C. § 507(a)(4), And Only with [sic] Respect to That Portion Of The Contribution That Relates To Services Performed During The 180 Day Period.
> >
> > . . .
> >
> > Based on the terms of the Pension Plan and applicable law, the contribution for the 1998 Plan Year accrued on December 31, 1998. Therefore, because the contribution accrued within 180 days fo the date the Debtors filed bankruptcy, the 1998 contribution is subject to priority under 11 U.S.C. § 507(a)(4), *but only* for the portion of the annual contribution that relates to services performed during the 180 day period.

Supplemental Memorandum at 40-42 (emphasis in original). See also Debtors' Proposed Findings of Fact and Conclusions of Law also dated January 31, 2001 ("Proposed Findings") which stated:

> For the reasons discussed above, the Pension Plan makes clear that the 1998 contribution accrued on December 31, 1998. Accordingly, the 1998 contribution is only afforded priority under 11 U.S.C. § 507(a)(4) and not administrative priority.

> for such employees is accorded priority under § 507(a)(4), however, the debtors argue[d] that the priority of the claim should be limited to "that portion of the contribution that relates to services performed during the 180-day period." (Supplemental Brief, p. 46.)

Decision at p. 51. That is why the court addressed, in part II(B) of its decision, the legal standards for fixing what portion of the 1998 contribution claim was, and what portion was not, entitled to § 507(a)(4) priority. Decision at pp. 2 n.3 and 48-55.

By definition, a § 507(a)(4) claim could not have existed unless there was an allowed unsecured claim. The court devoted considerable effort to considering and rejecting the debtors' objection that the claim's § 507(a)(4) priority was limited to the portion of the contribution that related to services performed during the 180-day period preceding the filing of the debtors' bankruptcy cases, and to addressing the proper way of determining the extent and amount of priority. Decision at pp. 51-55. This effort, and similar efforts on the part of the Plan Committee and DCNA, would have been wholly unnecessary if an objection to the timeliness of the claim for the 1998 contribution had been timely raised and sustained.

B.

The Creditors' Committee's motion misses the mark because the court properly treated the 1998 Pension Plan contribution claim as permissibly amended, relating back to the timely initial

scheduling of the claim in a lesser amount. The debtors each scheduled the 1998 Pension Plan contribution liability as a claim that was not disputed, contingent or liquidated, albeit not in the amounts or with the extent of priority ultimately determined by the court. The scheduled claim was an allowed claim (by virtue of 11 U.S.C. § 1111(a) and F. R. Bankr. P. 3003(b)(1)), and the debtors had the right to amend the schedules at any time under F.R. Bankr. P. 1009(a).

The debtors have not joined in the Creditors' Committee's motion for reconsideration. (Based on the discussion in part C, below, the debtors may have had concerns regarding their obligations as fiduciaries when they were running the Pension Plan, and may have had good reason not to join in the Creditors' Committee's motion.) The court can only view the debtors' litigation conduct as having effectively amended the schedules to include the debtors' undisputed liability for the full amount of the 1998 Pension Plan contribution liability, with such priority as is appropriate under the Bankruptcy Code.

That amendment of the schedules, which the debtor can make at any time, arguably supersedes the Creditors' Committee's ability to raise an objection that the proof of claim was untimely: under 11 U.S.C. § 1111(a) and F.R. Bankr. P. 3003(c)(2), the debtor's amendment of the schedules renders a proof of claim unnecessary unless § 1111(a) and Rule 3003(c)(2)

can somehow be restricted to schedules as amended prior to the bar date. That is an issue the court need not decide.

Even if § 1111(a) and Rule 3003(c)(2) can be read that way, as being ineffective to allow debts not scheduled or asserted by a proof of claim prior to the bar date, there **was** a timely claim already scheduled for the 1998 Pension Plan contribution. The amount may not have been in the proper amount and with the proper extent of priority, but the claim itself could be amended--by either the debtor or the creditor--to assert the higher correct amount and the greater extent of priority. See In re Kolstad, 928 F.2d 171 (5th Cir.), cert. denied, 502 U.S. 958 (1991) (amendments to timely creditor proofs of claim are liberally permitted to cure a defect in the claim as originally filed, so long as the correction does not set forth wholly new grounds of liability). So at a minimum, either the debtors or the claimants must be viewed as having sought amendment of the scheduled allowed claim to permit it to be allowed in its correct amount and with its correct amount of priority, whatever that might be determined to be.

No objection was raised to such amendment. Accordingly, there was no abuse of discretion in the court's deciding the matter on the basis of such amendment. No error having been committed by the court, there is no basis for granting the Creditors' Committee relief from the order.

The Creditors' Committee's concern that this will open the way for other creditors to file claims beyond the bar date is misguided, for the ruling is premised on the 1998 Pension Plan claim having already been timely asserted (by way of the debtor's schedules) albeit in an erroneous amount and with an erroneous amount of priority, and is not a case of allowing a claim setting forth wholly new grounds of liability to be asserted out of time.

C.

Even if the scheduled allowed claims ought not be deemed to have been amended in a manner that permitted this court to treat the claims as allowed (despite the lack of a timely proof of claim) in the amounts and with the priority determined by the court, the court must deny reconsideration. The objection of untimely assertion of the prepetition claims must be rejected as untimely itself. Whether based on waiver (see In re Mall at One Associates, L.P., 185 B.R. 1009 (Bankr. E.D. Pa. 1995)) or by way of analogy to decisions holding that new defenses are inappropriate for reconsideration under F.R. Civ. P. 59(e),[7] or

[7] The Pension Plan Committee and the DCNA argue at p. 6 of their opposition that:

> [P]arties simply are not permitted to use a reconsideration motion to raise new issues. As the First Circuit Court of Appeals stated, "Rule 59(e) motions are aimed at *re*consideration, not initial consideration." FDIC v. World University, Inc., 978 F.2d 10, 16 (1st Cir. 1992) (emphasis in original). Thus, parties cannot use Rule 59(e) to raise issues that could have been raised prior to entry of judgment.

on some other basis,[8] the sound exercise of the court's

> Id. As a result, Rule 59(e) motions ". . . must either clearly establish a manifest error of law or must present newly discovered evidence. They may not be used to argue a new legal theory." Id. (citations omitted).

See also Pan American World Airways, Inc. v. Care Travel Co. Ltd. (In re Pan American Corp.), 166 B.R. 538, 545 (S.D.N.Y. 1994) ("New arguments are not appropriately raised on a motion for reconsideration."); In re Sherrell, 205 B.R. 20, 21-22 (N.D.N.Y. 1997). Although this is not technically a Rule 59(e) motion because a final judgment has not been entered, the principle is the same: once the parties have tried a matter on the basis of certain positions, they are not free to take a position contrary to those positions to inject a new defense to liability. Although F.R. Civ. P. 8(c) (barring assertion of an affirmative defense not pled in an answer) did not apply here under F.R. Bankr. P. 9014, the failure to raise the bar date here was not merely at the stage of filing an objection to the claim but through the trial of the issue of whether the claim for the 1998 Pension Plan contribution was allowable, with there being only an objection to the extent of § 507(a)(4) priority, not an objection to allowance of the claim as an unsecured claim before the extent of priority was fixed. Once the objection was tried, the court was entitled to decide it on the basis of the objections that had been presented. The attempt to raise the bar date now simply comes too late.

[8] Pursuant to the court's scheduling order, the parties filed objections to their opponents' listed exhibits. The court held a final pretrial conference to address those objections in advance of the actual hearing. Under F.R. Civ. P. 16(e), the order following a final pretrial conference "shall be modified only to prevent manifest injustice." By attempting after the deadline for filing pretrial briefs and lists of exhibits, to inject a new defense that would require new briefing and additional evidence (establishing the existence of a bar date), the Creditors' Committee has run afoul of the court's scheduling order, and the final pretrial rulings adjudicating what evidence was admissible. (The court did not enter a written order memorializing its oral evidentiary rulings at the final pretrial conference, but the court's decision and interlocutory order entered after the trial and posttrial briefing of the issues certainly served as a final pretrial order, governing further resolution of this matter, that precluded assertion of new

discretion requires that it bind the Creditors' Committee to the positions that the debtors and the Creditors' Committee took in the matter being tried, briefed, and submitted to the court for decision.[9] The Creditors' Committee has not shown that refusing to permit belated injection of this new defense would be a manifest injustice. To the contrary, the court, and the opposing parties, ought not be put to the burden of addressing the matter on the basis of one set of defenses, only to be confronted after a decision has been announced with a wholly new defense.

Moreover, there is an odor of taking unfair advantage in the Creditors' Committee's raising the issue only now that other issues have been decided. Whether consciously or not, the Creditors' Committee delayed assertion of untimeliness gained it and the debtors strategic benefits in the litigation of the controversy.[10] The Plan Committee and DCNA note, without

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defenses, and evidence related thereto, absent modification of that order. It is fully within the court's discretion to deny any modification of that order.)

[9] The court does not rest its decision on judicial estoppel (see Donovan v. U.S. Postal Service, 530 F. Supp. 894, 902 (D. D.C. 1981)), because this is not a case of prior litigation, and because the record is silent regarding whether the Creditors' Committee's failure to raise the issue earlier was due to inadvertence. See Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980). However, the court notes that the Creditors' Committee is strangely silent regarding why it waited so long to raise the issue of the claim's timeliness.

[10] Given the Creditors' Committee's striking failure to allege any explanation of why it neglected earlier to raise the objection of untimeliness, the court would only be able to

contradiction by the Creditors' Committee, that:

> At the time the October 4, 1999 bar date [for filing prepetition claims passed, the Pension Plan was completely under the control of and managed by the Debtors which in turn were represented by the Venable law firm. Not until May, 2000 did the Debtors amend the Pension Plan and grant the Plan Committee the power to assert claims on the Pension Plan's behalf. Thus, when the October 4, 1999 bar date passed only the Debtors could have filed claims on the Pension Plan's behalf.
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> . . .
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> In each of its proofs of claim, the Plan Committee asserted that the Debtors breached their fiduciary duties to the Pension Plan. Neither the Debtors nor the Committee contended prior to trial that, to the extent the Pension Plan's claims were determined to be priority and unsecured claims, the claims should be disallowed as time-barred. Had they so contended, the Plan Committee would have asserted that the Debtors breached their fiduciary duties to the Pension Plan by failing to file claims on the Pension Plan's behalf in the Debtors' cases. The Plan Committee did not need to prosecute this claim because no party-in-interest asserted that the claims were time-barred.

Joint Opposition at pp. 2-3 and 8. The debtors, and the Creditors' Committee, thus had good reason, not to raise an objection of untimeliness as to the 1998 Pension Plan contribution.

First, an objection of untimeliness may objectively have had

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assume, absent other evidence, that the debtors' and Creditors' Committee counsel, who are extremely talented and well versed in bankruptcy law, made a conscious strategic litigation decision not to object that the 1998 contribution claim was time-barred. However, because the court is deciding the matter on the papers, without holding an evidentiary hearing, the court will not now find a conscious decision to delay raising the objection.

little chance of ultimate success. For example, such an objection might have been overcome by amendment of the administrative claim to assert a breach of fiduciary duty against the debtors for damages (in the amount that would have been paid on the time-barred prepetition claims) arising from the debtors' failing to assert a claim on behalf of Pension Plan. Alternatively, an objection of untimeliness might have readily been overcome by way of a formal motion to amend the allowed claim already scheduled or by way of a motion under F.R. Bankr. P. 9006 for leave to file the prepetition claim out of time, based on excusable neglect under the liberal standards of Pioneer Inv. Serv. Co. v. Brunswick Assoc. L.P., 507 U.S. 380 (1993).

Second, asserting such an objection (which would, moreover, entail additional expense) would likely have been counterproductive. Such an objection would have presented (1) the risk of injecting an additional technical issue into the litigation that could potentially distract the litigation's focus on the debtors' stronger arguments, and (2) the risk that, based on the technical nature of the defense, and the debtors' own failure while running the Pension Plan to assert a claim on its behalf, the debtors would be placed in an unsympathetic light possibly prejudicial to their likelihood of success of defeating administrative priority status for the claim for 1999 Pension Plan contributions. The debtors may have perceived that they

were already in an unfavorable light in contending that the hospital was sold by December 30, 1999. The debtors were relying upon an agreement reached in the waning moments of December 30, 1999, that was plainly contrived and artificial, if effective at all, to close the sale before December 31, 1999. They rushed to reach that agreement moments before midnight struck on December 30, 1999, in an obvious attempt to deprive the employees of a claim for Pension Plan contributions for the 1999 year. Raising a technical objection of untimeliness of the 1998 claim, the debtors could have concluded, would have placed the debtors in an even more unfavorable light.

The court will not allow the Creditors' Committee to have enjoyed the advantages of the debtors' litigation decisions, and to raise the issue of untimeliness only after the objection has been decided (such that no danger would flow from raising a technical objection that might have prejudiced the debtors' chances of success on the other litigated issues).

D.

The Plan Committee has employed the standards governing a motion to alter or amend under F.R. Civ. P. 59 in contending that its motion should be granted, namely, that relief will be granted if the court committed a clear error of law or if a manifest injustice would result. For the reasons set forth above, the court committed no clear error of law, nor would its decision

result in a manifest injustice.

III

In accordance with the foregoing, it is

ORDERED that the motion (DE No. 2250) of the Creditors' Committee to clarify alter or amend the order overruling in part the debtors' objection to the claims of the Pension Plan Committee is DENIED.

Dated: September 28, 2001.

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S. Martin Teel, Jr.
United States Bankruptcy Judge

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